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No._____

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In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN,
Secretary of Labor, U.S. Department of Labor,
Respondent,

v.

BURLINGTON NORTHERN INC.,
Petitioner.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Must the scope of an inspection warrant issued pursuant to Section 8(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §657(f), bear an appropriate relationship to the violation alleged in the employee's complaint, or is an unlimited wall-to-wall search of the employer's establishment authorized by such a warrant, irrespective of the nature and scope of the violation alleged by the employee?

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In the
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RAYMOND J. DONOVAN,
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BURLINGTON NORTHERN INC.,

Petitioner.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Ninth Circuit to review the case of *Donovan v. Burlington Northern Inc.* after judgment.

QUESTION PRESENTED FOR REVIEW

Must the scope of an inspection warrant issued pursuant to Section 8(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §657(f), bear an appropriate relationship to the violation alleged in the employee's complaint, or is an unlimited wall-to-wall search of the employer's establishment authorized by such a warrant, irrespective of the nature and scope of the violation alleged by the employee?

OPINIONS BELOW

The opinion of the district court below is *Donovan v. Burlington Northern Inc.*, 521 F.Supp. 99 (Mont. 1981), (Appendix A hereto), and that of the Court of Appeals is *Donovan v. Burlington Northern Inc.*, 694 F.2d 1213 (9th Cir. 1982) (Appendix B hereto).

JURISDICTION OF THIS COURT

This Court's jurisdiction to review the Ninth Circuit's holding by writ of certiorari is provided by 28 U.S.C. §1254(1).

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on December 23, 1982. Burlington Northern filed its petition for rehearing on January 3, 1983, which petition was denied January 24, 1983, (Appendix C hereto). Burlington Northern filed its motion to recall the Mandate for purposes of preparing the instant petition on February 17, 1983, which motion was granted by Order dated March 2, 1983, (Appendix D hereto).

28 U.S.C. §2101(c) requires the Writ of Certiorari to be applied for within 90 days of the judgment for which review is sought. Rule 20(4) of this Court provides that the time for filing of the petition runs from the date of the denial of rehearing. Pursuant to the foregoing, and Rule 28(2) of this Court, the instant Petition is timely filed.

Constitutional and Statutory Provisions Involved

U.S. Const. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 8(a) of the Occupational Safety and Health Act, 29 U.S.C. §657(a), provides:

> (a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Section 8(f)(1) of the Occupational Safety and Health Act, 29 U.S.C. §657(f)(1), provides:

Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representatives of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

STATEMENT OF THE CASE

An employee of Burlington Northern Railroad Co., (hereinafter BN), filed a complaint with the Occupational Safety and Health Administration, (hereinafter OSHA), on June 24, 1980.[1] The complaint was with regard to ventilation and respiratory protection during welding and cutting operations at four specific areas within the BN Main-

[1]This action was commenced December 4, 1980, against Burlington Northern Inc. Since that time, Burlington Northern Inc. has become a holding company of thirteen subsidiaries, eleven of which are wholly owned. The two subsidiaries which are not wholly owned are the El

tenance and Repair Facility at Laurel, Montana. The four areas were the Big Shop, Coal Shop, One Spot, and Rip Track areas. These areas are part of the Car Shops where various repair and maintenance procedures are performed. However, there are a number of other maintenance areas located at the Laurel facility which are not part of the Car Shop complex such as the Tower Runaround Track, Caboose Alley, and the Roundhouse. In addition, the BN Railroad Maintenance and Repair Facility, which is some 275 acres in size, houses support areas such as lunch rooms, locker rooms and rest rooms. There is a Material Department where parts and supplies are received, stored, and dispensed. There are engineering support personnel stationed in and about the BN Railroad Maintenance and Repair Facility where they perform their duties and maintain various records. The same can be said for bridge and building employees, water service employees, line electricians, and radio service employees.

On December 3, 1980, U.S. Magistrate Baugh issued an *ex parte* inspection warrant, or administrative search war-

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Paso Company, and New Mexico and Arizona Land Company. This action is directed against the Burlington Northern Railroad Company, a wholly-owned subsidiary of BNI. The following companies are partially-owned subsidiaries of Burlington Northern Railroad Company: BN Transport, Inc.; The Belt Railway Company of Chicago; Camas Prairie Railroad Company; Chicago Union Station Company; Northwestern Railway Company; The Denver Union Terminal Railway Company; Galveston Terminal Railway Company; Houston Belt & Terminal Railway Company; Iowa Transfer Railway Company; Kansas City Terminal Railway Company; Keokuk Union Depot Company; The Lake Superior Terminal and Transfer Railway Company; Longview Switching Company; The Minnesota Transfer Railway Company; Paducah & Illinois Railroad Company; Portland Terminal Railroad Company; The Pueblo Union Depot and Railroad Company; The Saint Paul Union Depot Company; Terminal Railroad Association of St. Louis; Trailer Train Company; The Wichita Union Terminal Railway Company; and Winona Bridge Railway Company.

rant (Appendix E hereto), to D.J. DiTommaso, Acting Area Director for OSHA, whereby OSHA agents were authorized to enter the BN Railroad Maintenance and Repair Facility, Laurel, Montana, for the purpose of making an inspection or search thereof. The warrant authorized a search of the entire facility. The face of the warrant indicates that it was issued pursuant to Sections 8(a) and 8(f) of the Occupational Safety and Health Act of 1970 (hereinafter Act), 29 U.S.C. §§657(a) and 657(f). However, the application for the warrant (Appendix F hereto), states that it was sought pursuant to the complaint by a BN employee, which falls within the purview of the latter section.

On the same day that the warrant was issued, OSHA agents attempted to enter the BN Railroad Maintenance and Repair Facility and search the premises but were refused entrance by BN personnel. The following day attorneys for the Secretary of Labor, (hereinafter Secretary) filed a petition in the U.S. District Court for the District of Montana, Billings Division, for an adjudication of civil contempt against BN pursuant to 28 U.S.C. §636(e). As the court of first instance, the court's jurisdiction was derived from 28 U.S.C. §1331 and 28 U.S.C. §636. BN then moved to quash the warrant on the ground that it was overly broad in that it authorized a general or wall-to-wall search of the BN Railroad Maintenance and Repair Facility in violation of the law and the Fourth Amendment to the United States Constitution.

After the matter was briefed by the parties, Judge James F. Battin heard oral argument and received additional documentation into the record. On April 20, 1981, the judge issued his Memorandum Opinion whereby he denied the Secretary's petition and granted BN's motion to quash the warrant as being overly broad. It was Judge Battin's conclusion that the scope of a warrant obtained pursuant to 29 U.S.C. §657(f), must be tailored in accordance with the employee's complaint. *Donovan v. Burlington Northern*

Inc., 521 F.Supp. 99 (Mont. 1981) (Appendix A hereto).

The Secretary sought review of the decision by the U.S. Court of Appeals for the Ninth Circuit in a timely manner. The matter was again briefed by the parties. Due to a scheduling problem on the part of BN's counsel, the matter was deemed submitted to the court without oral argument on June 11, 1982. In its opinion issued December 21, 1982, that court took the position that there need be no limitation of the scope of an inspection warrant obtained pursuant to 29 U.S.C. §657(f). *Donovan v. Burlington Northern Inc.*, 694 F.2d 1213 (9th Circ. 1982). (Appendix B hereto). It is this holding which gives rise to the instant petition for a writ of certiorari.

ARGUMENT

The question presented herein has been addressed by a number of federal district and appellate courts in the past few years. At least three circuit courts have arrived at opposing opinions resulting in a confusing and disruptive conflict in the law. While some courts have held that the scope of an inspection made pursuant to an employee's complaint must bear an appropriate relationship to the OSHA violation alleged, *e.g., Marshall v. North American Car Co.*, 626 F.2d 320 (3rd Cir. 1980), *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982), other courts have gone the opposite way and held that, once an employee complaint is received by OSHA, it may obtain an unlimited warrant irrespective of the scope and nature of the violation alleged by the employee. *e.g., Hern Iron Works v. Donovan*, 670 F.2d 838 (9th Cir. 1982); *Donovan v. Burlington Northern Inc.*, 694 F.2d 1213 (9th Cir. 1982). As a consequence, the law in one part of the nation is diametrically opposed to the law in another part of the nation, dependent solely upon an imaginary line delineating the federal judicial circuits. This schism has created a very unsettled area of the law

which can only worsen until rectified by a ruling on the question by the United States Supreme Court.

To demonstrate this conflict, an examination of the federal appellate court decisions regarding the question is instructive. The Ninth Circuit appears to be the only such court which has ruled that there need be no limitation on the scope of the search. In the *Hern Iron Works* case, the court decided "...to adopt the reasoning of the Seventh Circuit: '[T]he better view is that which permits, absent extraordinary circumstances, general inspections in response to employee complaints'." *Hern*, 670 F.2d at 41, quoting *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 24 (7th Cir. 1980). The court subsequently ruled that *Hern* was controlling the instant case on appeal below. *Burlington* 694 F.2d at 1214.

But an examination of the Seventh Circuit opinion "adopted" by the *Hern* court reveals a badly divided court which did *not* decide the question under consideration herein. Judge Sprecher, writing for the majority, divided his opinion into four parts, the last of which addressed the question herein. It is in this part of his opinion that he wrote the statement quoted by the *Hern* court. *Burkart* 625 F.2d at 1324.

Judge Wood wrote a strong dissent in *Burkart* vigorously disagreeing with Judge Sprecher. Chief Judge Fairchild concurred as to the first three parts of Judge Sprecher's opinion. But when he addressed the fourth part, he said, "As to the principles which should govern determination of the scope of the search, however, I find much that is persuasive in Judge Woods' dissent." He then concluded that "*On the specific facts of this case*...a search of the entire workplace was reasonable." *Id.* at 1326 (emphasis added). Thus, one judge on the *Burkart* panel espoused the proposition that there need be no limitation placed upon the scope of a warrant issued pursuant to a §8(f) employee complaint; one who argued that the scope should be appropriately

limited to the violations alleged; and one who seemed to favor the latter position but did not so state.

It may appear that *Marshall v. Seaward International, Inc.*, 510 F.Supp. 314 (W.D. Va. 1980), affirmed without opinion, 644 F.2d 880 (4th Cir. 1981), places the Fourth Circuit in the camp of the Ninth Circuit on this issue. But again the qualifier "*. . .given the circumstances of this case*" appears in the opinion. 510 F.Supp. at 318 (emphasis added). In addition to the employee complaints, the probable cause underlying the wall-to-wall search in *Seaward* rested upon information gathered in an earlier OSHA inspection of the premises, and upon other information supplied by Seaward itself. *Id.* at 317.

For those cases standing in opposition to the foregoing, the court is first directed to *Marshall v. North America Car Co.*, 626 F.2d 320 (3rd Cir. 1980). That court was dealing with a fact situation very similar to the instant case. An employee complaint was received by OSHA regarding three specific areas within a facility of 70 acres with numerous work stations, buildings, and so forth. The process was also similar to the instant case in that the Secretary sought an adjudication of contempt against the employer and was refused in district court.

On appeal the *North American Car* court faced precisely the same question as is at bar. The court discussed the distinction between inspections pursuant to §§8(a) and 8(f) of the Act and noted that only the latter was before the Court. Then, based upon extensive statutory construction, the court concluded in a unanimous opinion that "...where an OSHA inspection is conducted under §8(f) pursuant to an employee complaint, the scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint." *Id.* at 324.

The Eighth Circuit was faced with the question in *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719 (8th Cir. 1979). But that court did not decide the issue there as it

dealt with the case on a different ground. However, the court discussed the question and in dicta concluded that *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) and *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 46 L.Ed.2d 486 (1978), seem to require that "...An OSHA search made pursuant to a specific report of a violation be no more intrusive than necessary to investigate the violation." *Id.* at 721, fn.1.

The Eleventh Circuit came to grips with the issue at hand while reviewing a holding of the Occupational Safety and Health Review Commission (hereinafter Commission), *Donovan v. Sarasota Concrete Co.*, OSHRC NO. 78-5264, April 27, 1981. The scheme of the Act provides for an administrative review process which culminates in a review by the Commission. In this case the Commission held that "...where probable cause for an inspection is based solely on specific evidence of an existing violation, to accommodate the Fourth Amendment the inspection generally should be limited to the alleged violative condition." *Id.* at 21.

The Eleventh Circuit sustained the Commission's finding in an opinion issued just five days prior to the Ninth Circuit's opinion in the instant case below, and, consequently, was not considered there. *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982). The court noted that a warrant was necessary for both §8(a) and §8(f) nonconsensual searches under the Act, following the *Barlow's* decision. The probable cause underlying the §8(a) inspection is the administrative plan based upon neutral criteria, and the chief concern is the plan's neutrality. But an employee complaint does not have the administrative guidelines so as to assure that the complaint is not made merely to harrass the employer. Thus, a more particularlized inquiry is necessary in a §8(f) situation. Because of the foregoing, the court stated that "...we join those courts that have recognized that a complaint inspection must bear an ap-

propriate relationship to the violation alleged in the complaint." *Id.*, 633 F.2d at 1068.

The chaotic state of the law on this issue is clear from the foregoing review. The cases discussed represent but the tip of the iceberg. As noted previously, numerous other courts have addressed the issue, arriving at two totally different and mutually exclusive positions on the point. *See* e.g. *Hern*, 67 F.2d at 840, and *Burkart*, 625 F.2d at 1323, and cases cited therein, for partial listing. Even courts arriving at the same conclusion find themselves following different theories, e.g., *North American Car* (statutory construction) and *Sarasota*, (constitutional protections).

As long as the issue remains unresolved, some of the nation's citizens are being denied the protections guaranteed by our Constitution. Absent corrective legislation, which is unlikely, the situation can be corrected only by a ruling from this court. It thus seems inevitable that this court will have to address the issue.

The battle lines are narrow and fairly drawn. To grant the writ sought herein should not drain this court's limited resources excessively. On the other hand, to grant the writ now, rather than later, after still other courts have had to deal with the issue, would effectuate a substantial savings of the resources of the federal judiciary.

Respectfully submitted,

CHARLES C. DEARDEN
1003 First Northwestern Bank Center
Billings, Montana 59101
(406) 256-4416

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, CHARLES C. DEARDEN, a member of the Bar of the United States Supreme Court, hereby certify that I served three copies of the within Petition for Writ of Certiorari on all parties required to be served, listed below, by depositing same in the United States Post Office, with First Class postage prepaid, on the 22nd day of April, 1983.

Ms. Ann D. Nachbar
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Chas. C. Dearden

CHARLES C. DEARDEN

APPENDIX A

DONOVAN v. BURLINGTON NORTHERN INC.
Cite as 521 F.Supp. 99 (1981)

Raymond J. DONOVAN, Secretary of Labor,
United States Department of Labor, Petitioner,

v.

BURLINGTON NORTHERN INCORPORATED,
Respondent.

No. MCV-80-55-BLG.

United States District Court,
D. Montana,
Billings Division.

April 20, 1981.

Secretary of Labor moved for order adjudicating employer in civil contempt for refusing to permit officials of Occupational Safety and Health administration to inspect employer's maintenance and repair facilities pursuant to inspection warrant, and employer moved to quash inspection warrant on ground that scope of inspection was overbroad and in effect wall to wall warrant. The District Court, Battin, Chief Judge, held that inspection warrant exceeded boundaries of alleged violations set forth in employee complaint and would be stricken as being overbroad in scope.

Order accordingly.

1. Labor Relations—32

Employer who is requested by Secretary of Labor to permit inspection of its workplace by Occupational Safety and

Health Administration officials can refuse, requiring Secretary to obtain inspection warrant.

2. Labor Relations—32

"Plain view" principles regarding criminal probable cause apply with equal vigor to Occupational Safety and Health Administration inspections instituted upon employee complaint' thus, when Occupational Safety and Health Administration inspection officers conduct authorized inspection of premises and discover additional violations, or conditions supportive of probable cause, officers may seek additional warrants based upon their observations during initial inspection. Occupational Safety and Health Act of 1970, §8(f), 29 U.S.C.A. §657(f).

3. Labor Relations—32

Where employee complaint specified with particularity alleged violations occuring within various repair shops of employer, inspection warrant which authorized inspection of any area within entire yard of employer, as well as all records maintained on premises, exceeded boundaries of alleged violation set forth in employee complaint and was stricken as being overbroad in scope. Occupational Safety and Health Act of 1970, §8(f), 29 U.S.C.A. §657(f).

4. Searches and Seizures—7(6)

Fourth Amendment requires that scope of inspection warrant obtained by Occupational Safety and Health Administration officials, under section of statute governing inspection investigations and recordkeeping which provide for inspections upon employee complaint, be fashioned according to initial source of probable cause, that is, employee complaint. Occupational Safety and Health Act of 1970, §8(f), (f)(1), 29 U.S. C.A. §657(f), (f)(1); U.S.C.A. Const. Amend. 4.

Ann D. Nachbar, U.S. Dept. of Labor, Washington, D.C., for petitioner.

Charles C. Dearden, Billings, Mont., for respondent.

AMENDED MEMORANDUM OPINION

BATTIN, Chief Judge

Petitioner has moved the Court for an order adjudicating respondent in civil contempt for refusing to permit officials of the Occupational Safety and Health Admininstration to inspect respondent's maintenance and repair facility located at Laurel, Montana, pursuant to an inspection warrant authorized and issued by U.S. Magistrate G. Todd Baugh. The warrant was issued under the Occupational Safety and Health Act of 1970 (hereinafter referred to as the Act), 29 U.S.C. §§651 *et seq.* Respondent has moved to quash the inspection warrant on grounds that the scope of inspection is overbroad and in effect a "wall-to-wall" warrant. Oral argument regarding the motions was conducted by the Court on December 30, 1980, and additional supporting documents were filed by respondent on January 27, 1981, and April 1, 1981.

The sole issue for the Court's determination is the validity of the scope of an administrative inspection warrant secured by petitioner under the Act, 29 U.S.C. §§657(a) and (f).

FACTUAL BACKGROUND

On June 24, 1980, an employee of respondent Burlington Northern (hereinafter referred to as B.N.) filed a complaint with the Occupational Safety and Health Administration (hereinafter referred to as OSHA) concerning railroad car welding conditions existing at respondent's maintenance and repair facility which he believed to be in violation of the Act. The employee primarily alleged that regular employee exposure to toxic lead fumes was occurring despite

precautions allegedly instituted by B.N. Petitioner alleges that appropriate respirators suitable for lead fume filtering were not used at B.N.'s Laurel facility. On December 3, 1980, subsequent to the employee complaint, petitioner secured an inspection warrant from the Magistrate which provided permission for entry upon the workplace described as

"B.N., Inc.
Railroad Maintenance and Repair
Facility, Laurel, Montana."

Execution of and inspection pursuant to the warrant was attempted on the same day by OSHA officials who were refused entry by B.N. Petitioner then moved this Court for an order holding B.N. in contempt and allowing the search, and B.N. then moved to quash the warrant.

SCOPE OF THE WARRANT

> [1] The warrant provides authority "to inspect and investigate. . . the aforesaid establishment and any pertinent area, workplace, or work environment therein where work is performed by employees of Burlington Northern, Incorporated; to inspect all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein; and to inspect and copy records required to be kept by the Act and regulations issued thereunder, and any other records and documents which are directly related to the purpose of the inspection and investigation."

The applicable statute, 29 U.S.C. §§657(a) and (f), provides for two types of administrative inspections. §657(a) inspections are usually commenced pursuant to a general administrative plan designed to implement the objectives of compliance with the Act. Such an inspection is commonly referred to as a "wall-to-wall" inspection since an entire workplace may be searched under this section.[1] §657(f)(1)

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[1]29 U.S.C. §657(a) provides:

(a) In order to carry out the purposes of this chapter, the Secretary,

authorizes special inspections initiated by employee complaints concerning suspected violations of the Act.[2] The Secretary of Labor then orders an inspection when he determines reasonable grounds exist to suspect a violation of an agency regulation. An employer who is requested to permit an inspection of its workplace can refuse, therefore requiring the Secretary to obtain an inspection warrant. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978).

The Secretary contends that the broad remedial purposes of the act are sufficient to enable the execution of the inspection in accordance with the language set forth in the warrant. In *Burkart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980), the Court concluded that once probable cause is established through an employee complaint, OSHA is empowered to inspect the entire premises of an employer. Several other authorities have reached similar results. *See, e.g. Dravco Corp. v. Mar-*

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upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

[2]29 U.S.C. §657(f)(1) provides:

Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a

shall, 5 OSHC 2057, 2060, aff'd 578 F.2d 1373 (3rd Cir. 1978); *In the Matter of: Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 5 OSHC 1375, 1376 (N.D.Ill. 1977); *In the Matter of: Establishment Inspection of Chicago Magnet Wire Corp.*, 5 OSHC 2024, 2025 (N.D.Ill. 1977). These authorities contend limiting the scope of an inspection to the areas enumerated within an employee complaint negates the basic purposes and functions of the Act since employers will allegedly attempt to correct or "sanitize" workplaces open to OSHA inspectors while concealing violations of the Act present in other areas of the facility. It is further suggested that requiring nonconsensual inspections to be conducted by warrant would prevent any "fishing expeditions" by OSHA officials in a wall-to-wall or general inspection. *Burkart Randall Div. of Textron, Inc. v. Marshall, supra*, 625 F.2d at 1324. The Court cannot agree with this rationale. A balance must be struck between the need for intrusion and the threat of disruption to the occupant. *Marshall v. Central Mine Equipment Co., 608 F.2d 719, 720 n. 1 (8th Cir. 1979), citing Michigan v. Tyler*, 436 U.S. 499, 507, 98 S.Ct. 1942, 1948, 56 L.Ed.2d 486 (1978). A more scrutinized examination of nonroutine investigatory searches may be necessary when such are made under specific criteria, i.e., employee complaints. *See Michigan v.*

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copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

Tyler, supra, 436 U.S. at 507-508, 98 S.Ct. at 1948-1949 (1978). Contentions similar to those expressed by the Secretary have been discussed by recent decisions in other circuits. In *West Point-Pepperell, Inc. v. Marshall*, 496 F.Supp. 1178 (N.D.Ga. 1980), the overbreadth concerning an OSHA inspection warrant was discussed. The Court determined that when an inspection is sought pursuant to an employee complaint (§657(f)), the scope of such inspection must bear an appropriate relationship to violations alleged in the complaint. *West Point-Pepperell, Inc. v. Marshall, supra*, 496 F.Supp. at 1186, citing *Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3rd Cir. 1980). In dicta, the Court also found an incumbent duty by the secretary to limit the scope of inspection warrants based on complaints when applying for warrants before a magistrate. *West Point-Pepperell, Inc. v. Marshall, supra*, 496 F.Supp. at 1187.

[2] In *Marshall v. North American Car Co., supra*, 626 F.2d at 322-323, the Third Circuit analyzed §§657(a) and (f) of the Act. The Court agreed with the conclusion reached in *West Point-Pepperell, supra*, by interpreting §657(f) as requiring the scope of an inspection to bear some relationship to alleged violations enumerated in an employee complaint. *Marshall v. North American Car Co., supra*, 626 F.2d t 323. It was further noted upon analysis of the statute that

> . . .Congress refers to §8(f) inspections as "special inspections" in the third sentence. . . . [W]e believe that this term was used to distinguish §8(f) inspections from §8(a) inspections. The Secretary's argument, however, would convert every §8(f) inspection into a §8(a) wall-to-wall inspection. Because this deprives "special inspection" of any meaning whatsoever, it conflicts with the maxim of statutory construction that every word in a statute should be given meaning.

Marshall v. North American Car Co., supra, 626 F.2d at 323. We agree with the reasoning expressed in *North American Car*. Although there is little legislative history

relating to this issue, a literal reading of the statute clearly implies alternative inspections based upon substantially divergent criteria. It is incongruous to suggest that Congress intended §657(f) to do nothing more than echo the general inspection warrant provision, §657(a). Such an interpretation renders §657(f) unequivocally redundant and wholly without purpose. Rather, this Court perceives that literal interpretation and application of the statute reveals Congress intended the scope of the inspection to be limited to allegations contained within employee complaints and there is no categorical authority for wall-to-wall inspections in every case.[3]

[3] In the instant case, the affidavit of Daniel W. Wobig, the employee who filed the complaint with OSHA, sets forth the specific areas where he performed his job duties or had some knowledge of the working conditions. Although Wobig's job duties were primarily in the areas of B.N.'s yard known as the "One Spot" and "Rip Track" shops, he alleges extensive familiarity with all areas of the complex. Affidavits filed by B.N. indicate its Laurel railyard is an expansive facility covering approximately 275 acres. Several repair and maintenance duties are performed within an area known as the Car Shop Complex which consists of the One Spot Shop, Rip Track, Coal Shop and the Heavy Repair Shop. Other areas used in railroad car maintenance are the Tower Run Around Track and the Roundhouse. In addition to maintenance, other areas house the Material Department, Engineering and Recordkeeping,

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[3]Of course, the "plain view" principles regarding criminal probable cause apply with equal vigor to OSHA inspections. When OSHA inspection officers conduct an authorized inspection of a premises and discover additional violations, or conditions supportive of probable cause, they may seek additional warrants based upon their observations during the initial inspection. In other words, OSHA officials are not required to close their eyes or ignore possible violations not made the subject of an initial inspection.

bridge and building employees, water service and electricians, areas beyond the reach of the employee's complaint. It is obvious that the Laurel facility is comprised of highly specialized and compartmentalized repair stations over a large geographical area.

[4] Although the complaint does specify with particularity the alleged violations occurring within the various repair shops, from a review of the inspection warrant language it is apparent that *any* area within the entire yard is subject to inspection, as well as all records maintained on the premises. The Court is satisfied the inspection warrant exceeds the boundaries of alleged violations set forth in the employee complaint, and therefore must be stricken as being overbroad in its scope. We read *Michigan v. Tyler, supra*, 436 U.S. at 507, 98 S.Ct. at 1948, as requiring an OSHA inspection conducted pursuant to specific employee complaints to be no more intrusive or extensive than necessary.[4] Of special note is the dissenting opinion by Judge Wood in *Burkart Randall Div. of Textron, Inc. v. Marshall, supra*, 625 F.2d at 1328. Judge Wood concluded:

> It is not anomalous to permit general inspections where probable cause is supplied by a neutral plan but to limit inspections where probable cause is supplied by particularized employee complaints. Rather, the dichotomy is merely a recognition of the notion in-

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[4]Such reasoning is merely a logical inference derived from the statute and promulgated regulations.

§657(d) provides:

"Any information obtained by the Secretary, the Secretary of Health, Education, and Welfare, or a State agency under this Chapter shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible."

29 C.F.R. § 1903.7(d) provides:

"(d) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer's establishment."

herent in the fourth amendment that the scope of a warrant shall be tailored to the showing of probable cause.

Even upon careful analysis and application of the Act's remedial and protective purposes, this alone cannot provide the necessary probable cause where it otherwise is nonexistent. In accord with the Court's analysis are the recent district court cases of *Marshall v. Consolidated Rail Corp.* (Civil No. 79-1574, W.D.Pa. December 30, 1980), and *In the Matter of Establishment Inspection of ASARCO Incorporated Amarillo Copper Refinery, Amarillo, Texas*, 508 F.Supp. 350 (N.D.Tex. 1981). Although reaching somewhat different results than in the instant case, these Courts concluded §657(f) inspections must be tailored to the probable cause found within an employee complaint, thus establishing limits upon such inspections and negating the proposition that a wall-to-wall warrant is authorized in every OSHA investigation.

Thus, we reenforce the concept promoted by other jurisdictions that the Fourth Amendment requires that the scope of an inspection warrant issued under §657(f)(1) be fashioned according to the initial source of probable cause—the employee complaint.

CONCLUSION

Therefore, the Court holds the inspection warrant in this case is tantamount to authorization for a wall-to-wall search of B.N.'s facility. Where, as here, an inspection warrant is initiated by and primarily founded upon specific employee complaints pursuant to the Act, 29 U.S.C. §657(f), the probable cause derived from the complaint cannot be construed as authorizing an inspection of an entire premises. The Court recognizes that some inconvenience will invariably be visited upon an employer when subjected to an OSHA inspection. There may be cases where a complaint alleges violations of such magnitude and pervasiveness that a wall-to-wall search is necessary. However, in all

cases a §657(f) inspection warrant must bear an appropriate and logical relationship to the violations asserted within an employee complaint. The warrant in the instant case exceeds those boundaries of probable cause distilled from the complaint and must be accordingly quashed. The scope of subsequent warrants issued pursuant to the complaint in this case must be limited to inspections of the primary areas complained of, the One Spot, Rip Track and Coal Shop stations located within the Car Shop Complex, at B.N.'s Laurel, Montana, maintenance and repair railyard.

An appropriate order shall issue in accordance with this Memorandum Opinion.

APPENDIX B

Raymond J. DONOVAN,
Secretary of Labor, Petitioner-Appellant,

v.

BURLINGTON NORTHERN INC.,
Respondent-Appellee.

No. 81-3287.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 11, 1982.
Decided Dec. 21, 1982.

The Secretary of Labor appealed from an order of the United States District Court for the District of Montana, James F. Battin, Chief Judge, 521 F.Supp. 99, granting employer's motion to quash an administrative search warrant as overbroad. The Court of Appeals, Choy, Circuit Judge, held that inspection warrant was not overbroad even though it authorized inspection of area exceeding that specified in employee complaint.

Reversed and remanded.

1. Criminal Law—218(1)

In determining validity of criminal warrant, court is limited to information and circumstances that were available to issuing officer at time that warrant was issued.

2. Labor Relations—32

OSHA inspection warrant was not overbroad even though it authorized inspection of area exceeding that

specified in employee complaint where employee complaint was properly handled as part of valid inspection program, there was no evidence of bad faith, scope of search was carefully delineated in warrant, and there were no special circumstances present to exempt case from rule that general inspections were permitted in response to employee complaints. Occupational Safety and Health Act of 1970, §8(f), 29 US.C.A. §657(f).

T. Timothy Ryan, Jr., Benjamin W. Mintz, Allen H. Feldman, Charles I. Hadden, Ann D. Nachbar, Washington, D.C., for petitioner-appellant.

Charles C. Dearden, Billings, Mont., for respondent-appellee.

Appeal from the United States District Court for the District of Montana.

Before CHOY, TANG and BOOCHEVER, Circuit Judges.

CHOY, Circuit Judge:

The Secretary of Labor appeals from the district court's grant of Burlington Northern Inc.'s motion to quash an administative search warrant as overbroad. *See Donovan v. Burlington Northern Inc.*, 521 F.Supp. 99 (D.Mont. 1981). This appeal calls into question the permissable scope of an Occupational Safety and Health Administration (OSHA) search warrant based on an employee complaint under 29 U.S.C. §657(f). In light of *Hern Iron Works v. Donovan*, 670 F.2d 838 (9th Cir. 1982), *cert. denied*, _____ U.S. _____, 103 S.Ct. 69, 74 L.Ed.2d _____ (1982), decided after the district court quashed the administrative warrant here, we reverse and remand.

I. *Background*

On December 3, 1980, on the basis of a Burlington Nor-

thern employee's formal complaint to OSHA and a Burlington Northern memorandum which had been posted on the work premises and which corroborated a portion of the employee's complaint, OSHA obtained a warrant from a federal magistrate to inspect Burlington Northern's freight-car repair facility in Laurel, Montana. Later that day, Burlington Northern employees refused to allow OSHA inspectors serving the warrant to enter the premises.

Consequently, on December 4, 1980, OSHA petitioned the district court of Montana for an order holding Burlington Northern in contempt and requiring Burlington Northern to permit the OSHA inspection. OSHA also requested that Burlington Northern be required to reimburse the Secretary of Labor for OSHA's expenses in bringing the contempt action. Burlington Northern then moved to quash the warrant becuase it was overbroad. Reasoning that the fourth amendment requires the scope of an inspection warrant issued pursuant to an employee complaint to be fashioned according to the complaint and finding that the warrant here authorized inspection of an area exceeding that specified in the complaint, the district court quashed the warrant as overbroad. *See Burlington Northern*, 521 F.Supp. at 102-03.

II. *The Permissible Scope of OSHA Warrants*

The Occupational Safety and Health Act (the Act), 29 U.S.C. §§651-678, provides for two types of administrative inspections. A §657(a) inspection is undertaken pursuant to a general administrative plan designed to implement the objectives of the Act. Under a §657(a) inspection, the entire workplace may be searched. *See Marshall v. North American Car Co.*, 626 F.2d 320, 323 (3d Cir. 1980); *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1323 (7th Cir. 1980). A §657(f) inspection is based upon an employee complaint concerning suspected violations of

the Act. As this circuit has noted, *see Hern Iron Works*, 670 F.2d at 840-41; *J.R. Simplot Co. v. OSHA*, 640 F.2d 1134, 1137-38 (9th Cir. 1981), *cert. denied* _____ U.S. _____, 102 S.Ct. 1430, 71 L.Ed.2d 649 (1982) various district, appellate and administrative law courts have reached essentially two positions concerning the permissible scope of an OSHA warrant issued under §657(f). The first position, that the scope of the inspection must bear an appropriate relationship to the violations alleged in the employee complaint, has been adopted by the Third Circuit. *See North American Car*, 626 F.2d at 323. The district court here followed the reasoning of *North American Car* in deciding that the scope of an inspection may not exceed the scope of an employee complaint. *Burlington Northern*, 521 F.Supp. at 102.

The second position, that once an employee complaint establishes probable cause, the inspection need not be limited in scope to the substance of the complaint, was first announced by the Seventh Circuit. *See Burkart Randall*, 625 F.2d at 1325. The Secretary of Labor's regulations concerning §657(f) inspections are consistent with this position. *See* 29 C.F.R. §1903.11(b).

In *Hern*, we concluded that the

> Facts of the instant case viewed in light of OSHA's purpose in promoting employee safety persuade us to adopt the reasoning of the Seventh Circuit: "[T]he better view is that which permits, absent extraordinary circumstances, general inspections in response to employee complaints." *Burkart, supra*, 625 F.2d at 1324.

670 F.2d at 841. The warrant at issue in *Hern* was based on an employee complaint and authorized the inspection of an entire foundry. The warrant was not overbroad, however, because the issuing magistrate could have reasonably inferred that, in the absence of information indicating that the foundry was multifaceted or of such a large scale that a wall-to-wall inspection was unreasonable, the inspection of

the entire Hern establishment was necessary to detect complained-of ventilation hazards. *Id.*

Burlington-Northern argues that *Hern* is distinguishable from this case for three reasons. First, the warrant in *Hern*, although based on an employee complaint, was part of an inspection program designed to assure compliance with the Act. Second, while there was no information before the magistrate in *Hern* that a full-scale search would be unreasonable, here Burlington Northern presented information to the district court that its facility was a multifaceted, large-scale establishment. Thus, a full-scale search here would be unreasonable, according to Burlington Northern. Finally, Burlington Northern seems to argue that it is significant that the district court in *Hern* upheld the Secretary's third validly obtained warrant, whereas here the district court quashed the Secretary's first warrant.

We find none of these arguments persuasive. The only "inspection program designed to assure compliance with the Act" discussed or mentioned in *Hern* was OSHA's Instruction CPL 2.12A, which established guidelines for evaluating employee complaints. *Id.* at 841 & n. 4. The December 4, 1980, application for an administrative warrant in this case mentioned these same administrative guidelines and explained that they had been followed. In fact, a copy of the guidelines was attached to the application for a warrant. Thus, here, as in *Hern*, the employee complaint was properly handled as part of a valid inspection program designed to protect commercial property owners from the unbridled discretion of administrative officers.

[1] The record shows that the information concerning the size of the Laurel freight-car yard was presented to the district judge who evaluated the warrant but was not presented to the magistrate who issued it. In determining the validity of a *criminal* warrant, a court is limited to the

information and circumstances that were available to the issuing officer at the time that the warrant was issued. *United States v. Brown*, 455 F.2d 1201, 1204 (9th Cir.), *cert. denied*, 406 U.S. 960, 92 S.Ct. 2069, 32 L.Ed.2d 347 (1972). This circuit has also followed that principle concerning *administrative* search warrants. *See J.R. Simplot Co.*, 640 F.2d at 1138. Indeed, the focus in *Hern* was on the reasonableness of the *magistrate* in issuing the warrant. *See Hern*, 670 F.2d at 841 & n. 5. Burlington Northern has offered no reason why we should not apply that principle here, especially when this case is factually indistinguishable from *Hern*. Here, as in *Hern*, the application alleged ventilation defects so that the magistrate could have reasonably believed that the inspection of the entire premises was necessary to detect ventilation hazards. There is no evidence in the record to suggest that OSHA was acting in bad faith in obtaining a broad warrant.

The significance of Burlington Northern's third argument is not clear. Burlington Northern may be arguing that *Hern* is distinguishable because the Hern foundry, unlike Burlington Northern, had a history of not consenting to OSHA inspections. Although this court did mention Hern's history of not consenting to inspections, *id.* at 839, consideration of this factor was absent from the court's discussion of the permissible breadth of the warrant, *id.* at 841. Thus, Hern's past conduct does not seem to have had any effect on the court's conclusion. Moreover, we fail to see any rationale for subjecting the employers who have refused to allow warrantless or warrant-based entries to a broader search than that to which employers who have previously consented are subjected.

Two other considerations not raised by Burlington Northern are also important to our conclusion here. First, the warrant limits the scope of the search for documents to those the Act requires to be kept and those directly related to the purpose of determining whether Burlington Nor-

thern was "furnishing employment and a place of employment...free from recognized hazards that are causing or likely to cause death or serious physical harm." Thus, the scope of the search was carefully delineated to conform to the purpose of the search and was not overbroad. *Cf. Marshall v. W & W. Steel Co.*, 604 F.2d 1322, 1326-27 (10th Cir. 1979) (rejecting argument that warrant authorizing inspection of documents directly related to the purpose of inspection was overbroad.) Indeed, there does not appear to be any difference between the scope of the document search here and that in *Hern*. *See Hern*, 670 F.2d at 841. Second, we see no extraordinary circumstances here to exempt Burlington Northern from the "'better view...which permits...general inspections in response to employee complaints.'" *Hern*, 670 F.2d at 841 (quoting *Burkart Randall*, 625 F.2d at 1324).

III. *Conclusion*

[2] We find no basis upon which to distinguish this case from *Hern*. OSHA properly processed the employee complaint under its administrative program and the magistrate acted reasonably on the information before him. There is no indication of any bad faith on the part of OSHA in presenting information to the magistrate. The scope of the search for documents is carefully delineated in the warrant. And there is no special circumstance present to exempt this case from the *Hern* rule that general inspections are permitted in response to employee complaints.

We, therefore, reverse the district court's determination that the warrant was overbroad and the court's grant of the motion to quash. We also instruct the district court on remand: (1) to grant the petition of the Secretary for orders holding Burlington Northern in contempt and requiring Burlington Northern to permit the OSHA inspection; and (2) to determine whether Burlington Northern should be required to reimburse the Secretary for OSHA's expenses in bringing the contempt action.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND J. DONOVAN, Secretary of Labor,	)	
	)	No. 81-3287
Petitioner-Appellant,	)	
	)	DC No. CV 80-55-JFB
v.	)	
BURLINGTON NORTHERN, INC.,	)	ORDER
Respondent-Appellee.	)	

Before: CHOY, TANG and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

Filed January 24, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND J. DONOVAN Secretary of Labor, United States Department of Labor,	)	No. 81-3287
Plaintiff-Appellant,	)	DC# CV 80-55 Montana (Billings)
v.	)	
BURLINGTON NORTHERN, INC.,	)	
Defendant-Appellee.	)	ORDER

Before: CHOY, TANG, and BOOCHEVER, Circuit Judges.

Appellee's motion to recall the mandate is granted. The mandate is recalled and issuance of the mandate is stayed pending filing of a petition for certiorari.

Appellee's motion for stay of execution and enforcement of this court's order of December 21, 1982 is moot.

BY ORDER OF THE COURT:

Phillip B. Winberry
Clerk of Court

Filed March 2, 1983

by:

Patrick Fisher
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

In The Matter of	)	
	)	
Establishment Inspection of:	)	Civil No. 80-0054-A
	)	
BURLINGTON NORTHERN INCORPORATED	)	
	)	

INSPECTION WARRANT

TO: David J. DiTommaso
Acting Area Director
Occupational Safety and Health Administration
United States Department of Labor

Application having been made, and the Court finding upon the affidavit filed therewith that there is sufficient probable cause to issue an administrative inspection warrant authorizing entry for inspection and investigation at the workplace described as:

Burlington Northern Incorporated
Railroad Maintenance and Repair Facility
Laurel, Montana

IT IS HEREBY ORDERED that pursuant to §§8(a) and 8(f) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.*), hereinafter referred to as the Act, YOU AND YOUR DULY DESIGNATED REPRESENTATIVES of the Occupational Safety and Health Administration, United States Department of Labor, totalling not more than three persons ARE AUTHORIZED to enter without delay the above-described workplace during regular working hours and at other reasonable times, to inspect and in-

vestigate, within reasonable limits and in a reasonable manner, the aforesaid establishment and any pertinent area, workplace, or work environment therein where work is performed by employees of Burlington Northern Incorporated; to inspect all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein; and to inspect and copy records required to be kept by the Act and regulations issued thereunder, and any other records and documents which are directly related to the purpose of the inspection and investigation.

The purpose of inspection and investigation herein authorized shall be to determine whether the said employer Burlington Northern Incorporated is furnishing employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees, and whether said employer is complying with the occupational safety and health standards promulgated under the Act and the rules and regulations and orders issued pursuant to the Act, with respect to the following specific conditions and locations:

1. Welding, cutting and burning operations in the Big Shop, Coal Shop, One Spot and Rip Track areas at the Burlington Northern railroad repair and maintenance facility at Laurel, Montana, to include examination of any and all records of air monitoring, environmental samples and blood test results performed by or on behalf of Burlington Northern regarding welding fume exposure or lead fume exposure from welding, cutting or burning.

2. Adequacy of ventilation for welding operations as required by 29 CFR 1910.252 in the Big Shop, Coal Shop, and One Spot buildings at the said facility to include examination of any documents showing the components and capacity of mechanical ventilation or relating to any testing thereof performed by Burlington Northern.

3. Adequacy of respiratory protection furnished to workers in the Big Shop, Coal Shop, One Spot and Rip Track areas of the said facility to include examination of any respirators and the location(s) where they are stored, maintained or cleaned within said facility and of any written respirator program(s) or procedure(s) pertaining to respirator selection and use within said facility.

The inspection and investigation authorized under this warrant will be conducted by Compliance Safety and Health Officers who are authorized by the Assistant Secretary of Labor to conduct such inspections under the Act.

Said Compliance Safety and Health Officers will afford an opportunity to representatives of Burlington Northern Incorporated and to representatives authorized by its employees, to accompany them during the physical inspection of the workplace, for the purpose of aiding the inspection, pursuant to §8(e) of the Act.

During the course of the inspection and investigation, the said Compliance Safety and Health Officers are authorized to take photographs, measurements, and environmental samples, to employ other reasonable investigative techniques, and to question privately at the worksite, any employer, owner, operator, agent, or employees of the establishment.

Such activities will be accomplished so as to preclude unreasonable disruption of the operations of the employer's establishment, and said Compliance Safety and Health Officers shall, in conducting the inspection and investigation herein authorized, comply in all respects with regulations of the United States Department of Labor applicable to their conduct.

Information obtained or observed which the employer identifies as containing or revealing trade secrets shall be preserved in confidence pursuant to §15 of the Act, 29 CFR Section 1903.9 and 18 U.S.C. Section 1905.

A return shall be made to this Court, showing the inspection has been completed, within ten (10) days of the date of this inspection warrant.

Dated this 3rd day of December, 1980.

G. Todd Baugh
United States Magistrate

(Seal)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

In The Matter Of	)	
	)	
Establishment Inspection of:	)	Civil No. 80-0054A
	)	
BURLINGTON NORTHERN INCORPORATED	)	
	)	

APPLICATION FOR AN ADMINISTRATIVE INSPECTION WARRANT PURSUANT TO THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Ray Marshall, Secretary of Labor, United States Department of Labor, through his undersigned counsel hereby respectfully applies *ex parte* for an administrative inspection warrant pursuant to §8(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, *et seq.*), hereinafter referred to as the Act, and in support of such application alleges upon information and belief, as follows:

1. Burlington Northern Incorporated, a corporation, is engaged in the maintenance and repair of railroad equipment at an establishment located at Laurel, Montana and known as Burlington Northern Repair and Maintenance Facility, Laurel, Montana, within the jurisdiction of this Court, where work is being performed by its employees in connection with such maintenance and repair activities. Burlington Northern Incorporated conducts business in States other than Montana and is engaged in a business affecting commerce within the meaning of §3(3) of the Act. Burlington Northern Incorporated employs a number of employees at said location and is an employer within the meaning of §3(5) of the Act.

2. Section 5(a) of the Act requires that an employer engaged in a business affecting commerce "(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; [and] (2) shall comply with occupational safety and health standards promulgated under this Act."

3. Pursuant to Sections 6(a) and 6(b) of the Act, the Secretary of Labor has promulgated occupational safety and health standards which are applicable to general industry, 29 C.F.R. Part 1910.

4. Section 8(a) of the Act provides for inspections and investigations to determine compliance with the Act and said regulations as follows:

> Section 8(a). In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all *pertinent* conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

5. Section 8(f) of the Act provides for special inspections at the request of employees, as follows:

> Section 8(f)(1). Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threaten physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the

notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of the inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there is reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

6. On June 24, 1980, the Secretary received written notice of alleged violations and a request for inspection from an employee of Burlington Northern Incorporated, setting forth with reasonable particularity the grounds for the notice and the conditions of which inspection was requested. Upon receipt of such notification and pursuant to administrative guidelines for the evaluation thereof, the Secretary (by David J. DiTommaso, Acting Area Director, Occupational Safety and Health Administration, United States Department of Labor) has determined that there are reasonable grounds to believe that certain of the alleged violations or dangers exist as more fully set forth in the affidavit of David J. DiTommaso submitted herewith.

7. Section 8(f)(1) of the Act therefore requires that the Secretary shall make an inspection in accordance with the provisions of §8 of the Act as soon as practicable to determine if such violations or dangers exist.

8. Said inspection will take no more than three days to complete, will be conducted during regular working hours and at other reasonable times, and will be commenced as

soon as practicable after the issuance of the requested warrant.

9. The inspection and investigation will be limited to areas of the workplace or work environment where work is performed by employees of Burlington Northern Incorporated and to pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein including records required by the Act and regulations issued thereunder, and other records and documents which are directly related to the purpose of the inspection and investigation. The sole purpose of the inspection and investigation shall be to determine whether said employer is furnishing employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm and is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act, with respect to the specific conditions alleged in the employee request and determined by the Area Director to be supported by reasonable grounds.

10. The Compliance Officer(s) who conduct said inspection will afford an opportunity to representatives of each employer, and to representatives authorized by its employees, to accompany them for the purpose of aiding the inspection, pursuant to §8(e) of the Act.

11. Said Compliance Officers are authorized under the Act and 29 C.F.R. 1903.7 to take photographs and environmental samples, employ other reasonable investigative techniques, and to question privately at the worksite, any employer, owner, operator, agent, or employees of the establishment. Such activities will be accomplished so as to preclude unreasonable disruption of the operations of the employer's establishment, as required by 29 C.F.R. 1903.7(d).

Submitted this 3rd day of December, 1980.

Carin Ann Clauss
Solicitor of Labor

Tedrick A. Housh, Sr.
Regional Solicitor

Henry C. Mahlman
Associate Regional Solicitor

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No. 82-1780

Office-Supreme Court, U.S.
FILED
1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

BURLINGTON NORTHERN, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the warrant authorizing the inspection of petitioner's business premises pursuant to the Occupational Safety and Health Act of 1970 was overbroad.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1780

BURLINGTON NORTHERN, INC., PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B7) is reported at 694 F.2d 1213. The opinion of the district court (Pet. App. A1-A11) is reported at 521 F.Supp. 99.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1982. A petition for rehearing was denied on January 24, 1983 (Pet. App. C1). The petition for a writ of certiorari was filed on April 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Burlington Northern, Inc., operates a freight car repair facility in Laurel, Montana. On June 24, 1980, a Burlington employee filed a formal complaint with the Occupational Safety and Health Administration ("OSHA") in which he alleged the existence of 36 occupational hazards at the company's Laurel facility (App. A,

infra, 1a-5a).[1] The complaint stated that approximately 300 employees were exposed to a variety of serious hazards throughout the "entire repair facility and yards," such as "[h]eating, cutting and welding through lead based paint with no respiratory protection," "[i]nadequate ventilation in the Car Shop, Coal Shop, and One Spot," and "contaminat[ion] with almost every substance that the railroad has ever transported" at the Rip Track, One Spot and Big Shop (*id.* at 2a-4a).

The allegations concerning lead exposure were corroborated by a June 5, 1980 company memorandum that expressly acknowledged that Burlington workers must be protected from inhaling lead fumes whenever they heat lead-based paint with a torch or welding equipment (see Pet. App. B3). Based on that information and his general finding that the complaining employee was "knowledg[e]able and credible" (App. B, *infra*, 10a), OSHA's Acting Area Director evaluated the employee complaint and determined that reasonable grounds supported certain of the most serious allegations (*id.* at 7a-9a): (1) lead and zinc exposure during welding, burning and cutting operations in the Big Shop, Coal Shop, One Spot Shop and Rip Track areas of the facility; (2) inadequate ventilation for welding operations in the Big Shop, Coal Shop and One Spot; and (3) inadequate respirator protection for employees in the Big Shop, Coal Shop, One Spot and Rip Track areas.

Accordingly, pursuant to Sections 8(a) and 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a) and 657(f)(1),[2] and the pertinent OSHA regulation

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[1]The employee complaint is reproduced at App. A, *infra*, 1a-5a. The affidavit of the OSHA Acting Area Director is reproduced at App. B, *infra*, 6a-11a.

[2]Section 8(a), 29 U.S.C. 657(a), authorizes the Secretary of Labor "(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area * * * where work is

and program directive,[3] the Secretary applied to the United States District Court for the District of Montana for a limited-scope warrant to verify those specific allegations

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performed by an employee of an employer; and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein * * *."

Section 8(f)(1), 29 U.S.C. 657(f)(1), provides that where an employee or employee representative believes "that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists," he may "request an inspection" by presenting a signed, written notice to the Secretary "set[ting] forth with reasonable particularity the grounds for the notice * * *." If the Secretary then "determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative * * * in writing of such determination."

[3]The Secretary's regulation, 29 C.F.R. 1903.11(b), states that occupational safety and health inspections in response to formal employee complaints "shall not be limited to matters referred to in the complaint."

OSHA Instruction CPL 2.12A, [1978-1979 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 11,743, which went into effect September 1, 1979, provided that complaint inspections in high-hazard industries should generally extend to the entire facility, but should be limited to the scope of the complaint in low-hazard industries. CPL 2.12A was pertinently incorporated into OSHA Instruction CPL 2.45, OSHA's Interim Field Operations Manual, on September 15, 1980, and replaced by OSHA Instruction CPL 2.12B, 3 Empl. Safety & Health Guide (CCH) para. 12,451, on February 1, 1982. The latter directive, which is currently in effect, further limits the circumstances under which full-scope complaint inspections will be conducted. This new directive generally limits safety inspections to complaint matters unless the establishment itself has a higher-than-average lost workday injury rate and is a member of a high-rate industry. The inspection following a health complaint in a high-hazard industry normally is to extend to all areas where a potentially serious health problem may exist.

(Pet. App. F1-F5). The Secretary's application stated (*id.* at F4; emphasis added):[4]

> The sole purpose of the inspection and investigation shall be to determine whether said employer is furnishing employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm and is complying with the occupational safety and health standards promulgated under the Act and the rules, regulations and orders issued pursuant to the Act, *with respect to the specific conditions alleged in the employee request and determined by the Area Director to be supported by reasonable grounds.*

See also App. B, *infra*, 10a.

On December 3, 1980, a United States Magistrate issued a warrant authorizing an inspection of Burlington Northern's Laurel workplace (Pet. App. E1-E4). The third paragraph of the warrant states that the purpose of the inspection is to determine whether the employer is complying with the Act and with OSHA regulations with respect to the "specific conditions and locations" enumerated in the OSHA Acting Area Director's affidavit, *i.e.*, the Big Shop, the Coal Shop, the One Spot Shop, the Rip Track, and the respirator maintenance and storage areas (*id.* at E2-E3). These areas are to be inspected for exposure to toxic fumes and inadequate ventilation, and the respirators in the maintenance and storage areas are also to be checked for adequacy.

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[4]In support of his application, the Secretary filed a transcription of the complaint, a copy of the Burlington memorandum discussing the need to protect the workers from excessive lead exposure, a copy of the Secretary's administrative guidelines for evaluating such complaints (CPL 2.12A), an affidavit by the complaining employee, and an affidavit by the OSHA Acting Area Director explaining why he had credited portions of the complaint.

Burlington Northern refused to honor the warrant, and the Secretary petitioned the district court to hold the company in civil contempt. The company opposed the petition and moved to quash the warrant as overbroad because it allegedly authorized a search beyond the scope of the complaint. The district court granted petitioner's motion to quash the warrant (Pet. App. A1-A11). In so doing, the court rejected the Secretary's contention that the warrant by its terms limited the inspection to the areas about which the employee had complained; instead, focusing on only the first and second (but not the third) paragraphs of the warrant, the court determined that the warrant authorized a full-scope inspection of the Laurel facility (*id.* at A9). The court ruled that under both Section 8(f)(1) of the Act and the Fourth Amendment, the scope of an inspection conducted pursuant to an employee complaint must be tailored to the scope of the complaint (Pet. App. A8-A10). Accordingly, the court concluded that the "scope of subsequent warrants issued pursuant to the complaint in this case must be limited to inspections of the primary areas complained of, the One Spot, Rip Track and Coal Shop stations" (*id.* at A11).

2. The court of appeals reversed (Pet. App. B1-B7). The court first noted that the warrant application had been filed in response to an employee complaint that "was properly handled as part of a valid inspection program designed to protect commercial property owners from the unbridled discretion of administrative officers" (*id.* at B5). Second, the court found that "the application alleged ventilation defects so that the magistrate could have reasonably believed that the inspection of the entire premises was necessary to detect ventilation hazards" (*id.* at B6). It pointed out that there was no information before the magistrate indicating that the facility was too large for a full-scale inspection to be reasonable, nor was there evidence suggesting that OSHA had acted in bad faith in obtaining a broad

warrant (*id.* at B5, B6). Third, the court stated that the scope of the search for documents "was carefully delineated to conform to the purpose of the search and was not overbroad" (*id.* at B7). Finally, the court found "no extraordinary circumstances" here to exempt Burlington Northern from the general rule allowing the scope of OSHA inspections to exceed the scope of underlying employee complaints (*ibid.*).

ARGUMENT

Petitioner urges the Court to grant review in this case in order to determine whether an OSHA warrant based on an employee complaint must restrict the inspection to those areas of the worksite mentioned in the employee complaint. We note that on two recent occasions, the Court has declined review in cases presenting this issue. See *Hern Iron Works, Inc.* v. *Donovan*, cert. denied, No. 81-2193 (Oct. 4, 1982); *J.R. Simplot Co.* v. *OSHA*, cert. denied, 455 U.S. 939 (1982). There is no need even to consider that question here, however, because the OSHA warrant at issue is in fact a limited-scope warrant. Moreover, given the nature of the allegations in the employee complaint, the magistrate would have been justified in issuing a full-scope warrant. Accordingly, this case does not warrant further review.

1. The scope of the instant warrant would have been upheld even by those courts of appeals that do not agree with the Ninth Circuit that full-scope complaint inspections are proper as a matter of law.[5] First, careful examination of

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[5]Five other courts of appeals have considered the scope of inspection issue. In an unpublished opinion, the Fourth Circuit affirmed a district court decision holding that full-scope warrants founded on employee complaints are constitutionally permissible. *Marshall* v. *Seaward International, Inc.*, 644 F.2d 880 (1981), aff'g 510 F. Supp. 314 (W.D. Va. 1980). The Seventh Circuit, in *Burkart Randall Division of Textron, Inc.* v. *Marshall*, 625 F.2d 1313 (1980), upheld a full-scope warrant based on an employee complaint; however, because each of the three judges on the panel wrote a separate opinion, there was no opinion

the third paragraph of the warrant shows that the inspection authorized by the magistrate is in fact limited in scope. Under the express terms of the warrant, the Secretary is to confine his inquiry to the "Big Shop," the "Coal Shop," the "One Spot," the "Rip Track" and "locations where [respirators] are stored, maintained and cleaned" (Pet. App. E2-E3). These are the particular work areas that must be inspected in order to verify the allegations in the complaint that the Secretary credited (*id.* at F-4; App. B, *infra*, 7a-9a).[6]

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for the court on the question presented here. The Seventh Circuit had previously upheld a full-scope warrant over objection that the inspection should be limited in scope to the substance of the complaint. *In re Establishment Inspection of Gilbert & Bennett Manufacturing Co.*, 589 F.2d 1335, cert. denied, 444 U.S. 884 (1979), aff'g 1977-1978 O. S. H. Dec. (CCH) para. 22,270 (N.D. Ill. 1977). See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra*, 625 F.2d at 1324-1325 n.18.

On the other hand, the Third Circuit, in *Marshall* v. *North American Car Co.*, 626 F.2d 320 (1980), held as a matter of statutory construction that the scope of OSHA inspections conducted under 29 U.S.C. 657(f)(1) pursuant to an employee complaint must bear an appropriate relationship to the violations alleged in the complaint. The Eleventh Circuit, in *Donovan* v. *Sarasota Concrete Co.*, 693 F.2d 1061 (1982), held that the Fourth Amendment requires limited scope inspections, and the Eighth Circuit, in dictum, commented to the same effect. *Marshall* v. *Central Mine Equipment Co.*, 608 F.2d 719 (1979).

[6]The district court held that OSHA is entitled to gain entry only into "the primary areas complained of," which the court described as the One Spot, Rip Track, and Coal Shop (Pet. App. A11). The warrant authorizes entry into those areas and two additional locations, the Big Shop and the respirator storage and maintenance areas. The employee's complaint mentions the Big Shop at least as often and as prominently as the other areas into which the district court agreed that entry is permissible. Furthermore, it is clear that the Secretary must have access to the respirator storage and maintenance areas in order to verify the complaint concerning inadequate respirators. Thus, the locations to which the warrant authorizes OSHA inspectors to be admitted correspond precisely to the scope of the employee complaint.

Second, the magistrate would have been justified in authorizing a full-scope search because the hazardous conditions reported in the complaint are "sufficiently diffuse to sustain [a] determination that a search of the entire workplace [is] reasonable." *Burkart Randall Division of Textron, Inc.* v. *Marshall,* 625 F.2d 1313, 1326 (7th Cir. 1980) (Fairchild, C.J., concurring). As the court of appeals concluded (Pet. App. B6-B7), because one of the alleged violations is inadequate ventilation, it is reasonable to infer that inspection of the entire facility would be necessary. In these circumstances, a warrant authorizing a search of petitioner's entire workplace would bear a reasonable relationship to the nature of the hazards alleged (see *Donovan* v. *Sarasota Concrete Co.,* 693 F.2d 1061 (11th Cir. 1982); *Marshall* v. *North American Car Co.,* 626 F.2d 320, 324 (3d Cir. 1980)), and thus would be proper under any of the tests set forth by the courts of appeals that have considered the scope of inspection issue.

2. Although review is not warranted in this case, we submit that full-scope inspections based on employee complaints are consistent with both the Fourth Amendment and the Occupational Safety and Health Act. Because such inspections are governed by reasonable administrative standards and must be approved by a neutral magistrate, there is no danger that the decision whether to conduct a full-scope search will be left to the unbridled discretion of the officers in the field. See *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 323 (1978). Moreover, if full-scope inspections are proper when conducted pursuant to general administrative plans — where there is no specific basis for suspecting that the conditions at a particular facility are in violation of the Act — then it is reasonable to conclude that full-scope inspections should also be permissible where there is probable cause to believe that a violation exists at a particular establishment. See *Burkart Randall Division of Textron,*

Inc. v. *Marshall, supra,* 625 F.2d at 1323-1326 (opinion of Sprecher, J.). That is especially so since, under OSHA's current program directive permits safety inspections (which constitute the vast majority of inspections) to be full-scope in response to a specific complaint only when the establishment itself has a higher-than-average injury rate and is part of a high-hazard industry. See note 3, *supra.* Finally, Section 8(f)(1) of the Act is a description of the circumstances under which the Secretary *must* conduct an inspection. Thus, the section is essentially an employee rights provision (see *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 16 & n.25 (1980)), not a limitation on the Secretary's authority to inspect. See *Burkart Randall Division of Textron, Inc.* v. *Marshall, supra,* 625 F.2d at 1326 (opinion of Sprecher, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Deputy Solicitor

KAREN I. WARD
Associate Solicitor

CHARLES I. HADDEN
Counsel for Appellate Litigation

ANN D. NACHBAR
Attorney
Department of Labor

JUNE 1983

DOJ-1983-06

APPENDIX A

Occupational Safety and Health Administration Complaint

U.S. Department of Labor

The undersigned (check one)

[X] Employee [ ] Representative of Employees

[ ] Other (*specify*) _____

believes that a violation at the following place of employment of an occupational safety or health standard exists which is a job safety or health hazard.

Employer's Name

Burlington Northern

Employer's Address (Street) *(City)*

Railroad Street Laurel,

(State) *(Zip Code)* *Telephone*

Montana 59044 628-6259

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1. Kind of business

Freight car repair

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2. Specify the particular building or worksite where the alleged violation is located, including address.

The entire repair facility and yards at Laurel, Montana.

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3. Specify the name and phone number of employer's agent(s) in charge.

Mr. R. L. Bowers 628-6259

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4. *Describe briefly the hazard which exists there including the approximate number of employees exposed to or threatened by such hazard.*

About 300 workers are exposed to all the articles listed below:

1. Heating, cutting and welding through lead based paint with no respiratory protection.
2. Heating, cutting, and welding on galvanized metal with no respiratory protection.
3. Refusal to supply proper respiratory protection.
4. Cutting and welding over contaminated ground resulting in the inhalation of toxic smoke and fumes.
5. Exposure of workers to contaminated ground.
6. Failure to clean up contamination.
7. Failure to inform workers of the contents of cars that they are working on.
8. Insufficient work space between cars on rip track.
9. Inadequate blocking of cars on rip track.
10. Lifting more than maximum capacity with jacks on rip track
11. No protection from falling ice on buildings.
12. Inadequate snow removal.

13. Moving cars on tracks where men are working.

14. Poor placement of fire extinguishers.

15. Falsifying tags on fire extinguishers.

16. Storage of oxygen and gas bottles too close together.

17. Burning and welding on LP gas cars and all other types of dangerous tank and freight cars.

18. Lifting more than maximum capacity with cranes and fork trucks and hoists.

19. Lifting more than maximum capacity of cranes that have frayed cables and slings.

20. The use of cables, chains and slings far beyond their capacities.

21. Moving cars by hand, in and out of shops.

22. Jack stands that are in extremely dangerous condition.

23. Men working overhead without having the area roped off.

24. Fire damage that has not been repaired in over 2 years.

25. Burlington Northern will supply their men only with dust respirators and has no type of protection from any type of fumes or vapors.

26. Inadequate ventilation in the Car Shop, Coal Shop, and One Spot. The Wood Shop has ventilation equipment but it has been out of operation for almost three years.

27. Inadequate preventitive maintenance program. This company will only fix something when it breaks down or causes injury to an employee.

28. No reverse warning devices on much of the equipment.

29. Burning of grease and slug from cars with ox-ax torches and no respiratory equipment provided.

30. Work areas on the rip track, One Spot yards, and Big Shop are contaminated with almost every substance that the railroad has ever transported.

31. Hoses, lines and parts are scattered in disarray on the floor of the Big Shop and Coal Shop.

32. Huck guns and hoses in poor repair, leaking, and the possibility of injection of hydraulic fluid under skin.

33. Exposed electrodes and wires on welders.

34. Failure to correct articles brought up at safety meetings.

35. Burlington Northern does not comply with their own safety rules.

36. Working on trains with no blue flag protection.

5. (a) *To your knowledge is this condition being considered by any other Government agency, or has it been considered by any other Government agency?*

Yes [ ] No [x]

5. (b) *If yes, and you know, which Government agency?*

6. *Has this condition been brought to the attention of the employer?*

Yes [x] No [ ] Don't know [ ]

7. *Please indicate your desire:*

[x] I **do not** *want my name revealed to the employer*

[ ] My name **may be** *revealed to the employer*

NOTE: It is unlawful to make any false statement, representation or certification in any document filed pursuant to the Occupational Safety and Health Act of 1970. Violations can be punished by a fine of not more than $10,000, or by imprisonment of not more than six months, or by both. (Section 17(g))

Signature /s/ Daniel W. Wobig *Date* June 24, 1980

Typed or Printed Name Daniel W. Wobig

Address (Street) 305 W. 1st St. *(City)* Laurel,

(State) Mt. (Zip Code) 59044 Telephone 628-7811

*If you are an authorized representative of*_____

*employees affected by this complaint, please*_____

*state the name of your organization and your title*_____

APPENDIX B

State of Montana)
) ss.
County of Yellowstone)

AFFIDAVIT OF DAVID J. DiTOMMASO

I, DAVID J. DiTOMMASO, being first duly sworn, hereby state as follows:

1. I am Acting Area Director for the Occupational Safety and Health Administration, United States Department of Labor. As Acting Area Director I am responsible for the Billings Area Office of said agency and for enforcement of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*) in the State of Montana.

2. Section 8(a) of said Act and 29 C.F.R. 1903.3 authorize Compliance Safety and Health Officers of the Department of Labor to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any employee, owner, operator, agent or employer; and to review records required by the Act and regulations, and other records which are directly related to the purpose of the inspection.

3. Under 29 C.F.R. 1903.4, upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment, or where such a refusal may be anticipated, the Area Director shall consult with the

Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary. Under 29 C.F.R. 1903.4(d) the term "compulsory process" includes *ex parte* application for an inspection warrant or its equivalent.

4. On June 24, 1980, I received the Occupational Safety and Health Complaint attached to the affidavit of Daniel W. Wobig, submitted herewith, which alleges the existence of certain specified hazards to an establishment identified as:

> Burlington Northern Incorporated
> Railroad Maintenance and Repair Facility
> Laurel, Montana

and requests inspection thereof by the Occupational Safety and Health Administration pursuant to Section 8(f) of the Act.

5. In reviewing the allegations of the said complaint and additional information furnished by the complainant and evaluating them in accordance with administrative guidelines set forth in OSHA Instruction CPL 2.12A, a copy of which is attached hereto, I have determined that there are reasonable grounds to believe that violations of applicable occupational safety and health standards exist with respect to the following conditions and areas of the facility:

> (a) *Welding, cutting and burning operations conducted in the Big Shop, Coal Shop, One Stop and Rip Track areas of the said facility.* The complainant states that regular employee exposure to toxic lead fume exists when employees weld, cut and burn on railroad cars that are painted with leaded paints. This is corroborated by a Burlington Northern document attached to his affidavit as Exhibit B. The applicable standard, 29 CFR 1910. 1025, prohibits lead exposure

above specified levels, requires regular exposure monitoring and medical surveillance by the employer, and specifies particular types of mandatory respirator protection, none of which have been observed. It has been my experience that allowable levels for lead fume exposure are quickly exceeded in circumstances similar to those alleged by the complainant. This exposure is occuring regularly to seventy or more employees in the areas mentioned and occurs on a daily basis according to the information furnished by the complainant. Lead exposure can result in both chronic or acute health effects. According to the complainant, he is aware of no employees who suffered acute effects but there is a significant danger that prolonged exposure could cause serious, irreversible damage to certain organ systems including the central nervous system and the kidneys.

In that some welding is performed on galvanized metals, there is a similar hazard presented from zinc fume exposure. Zinc fume exposure is regulated by 29 CFR 1910.1000, which standard sets precise limits for exposure levels, requires specified respirator protection and reduction of exposure through engineering or administrative measures. Zinc fume above the allowable levels is very likely to occur in connection with such welding operations.

(b) *Adequacy of ventilation for welding operations as required by 29 CFR 1910.252 in the Big Shop, Coal Shop and One Spot buildings.*

The welding standard, 29 CFR 1910.252, contains specific ventilation requirements for indoor welding operations in terms of flow rate and volume, as well as specific detailed requirements for ventilating welding operations involving exposure to lead fume. Lead

fume exposure from welding has been substantiated in the above areas and the complainant states that mechanical ventiliation is only provided in one of the three shops. According to the complainant, this ventilation has not been functioning properly. There are therefore reasonable grounds to conclude that violations of the welding standard exist. Inadequate ventilation would substantially increase and prolong welding fume and lead fume exposure to employees in these areas and would likely cause such exposure to employees other than the welders themselves.

(c) *Adequacy of respiratory protection furnished to workers in the Big Shop, Coal Shop, One Spot and Rip Track areas.*

The lead standard, 29 CFR 1910.1025 and the zinc fume standard, 29 CFR 1910.1000, both specify appropriate respirator protection for workers exposed to these substances. In addition, the general respirator standard, 29 CFR 1910.134, requires the use of respirators which are applicable and suitable to the hazard. The AO R90N filter described by the complainant is suitable only for dust exposures and is not suitable for the lead and zinc fume exposure apparent here.

The respirator standard, 29 CFR 1910.134, also requires the selection and use of such respirators pursuant to a detailed written respirator program to insure that they are properly selected, used, maintained and furnished to workers. In that, according to the complainant, respirators are seldom used and only an inappropriate respirator is furnished, there are reasonable grounds to conclude that violations of 29 CFR 1910.134 exist. Such violations would appear to affect the majority of the persons in the three shop areas who do welding, cutting and burning.

6. In obtaining information from the complainant, Daniel W. Wobig, upon which I based my evaluation of the above conditions, I have found him to be knowledgable [*sic*] and credible as to his description of the working conditions. His allegations concerning lead-based paints are corroborated by the Burlington Northern document referred to above. In addition, in signing the complaint attached to his affidavit, Mr. Wobig recognized that any false statement or representation therein would subject him to criminal penalties.

7. Burlington Northern Incorporated has followed a consistent policy of refusing to permit inspection of its premises by the Occupational Safety and Health Administration and therefore it may be reasonably anticipated that the company will not permit inspection of its Laurel, Montana facility absent an inspection warrant. Most recently, representatives of my office, including myself, have been refused permission to inspect Burlington Northern facilities at Havre, Montana, on January 31, 1980, and at Missoula, Montana, on May 28, 1980.

8. If authorized by the Court, the inspection sought herein will be conducted by Compliance Safety and Health Officers who are authorized to conduct such inspections by the Assistant Secretary of Labor.

9. Said inspection will be conducted in accordance with the limitations as to time, manner and scope set out in paragraph 2. The sole purpose of said inspection will be to determine the status of compliance of Burlington Northern with the Occupational Safety and Health Act and applicable regulations promulgated thereunder with respect to the specific conditions stated above. Civil citations requiring the correction of any observed violations may be issued and civil penalties may be proposed. No evidence of criminal conduct is being sought.

10. Said inspection should take no more than three working days to complete and will be commenced as soon as is practicable after the issuance of an inspection warrant.

David J. DiTommaso
Acting Area Director

Subscribed and sworn to before me this _____ day of December, 1980.

United States Magistrate